No. 14-4476

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARLTON BAPTISTE, a.k.a., CARLTON BAPTIST,

Petitioner,

v.

LORETTA E. LYNCH
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION ON REVIEW FROM AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

The United States Department of Justice (DOJ) in its Opposition Brief continues to argue that Carlton Baptiste should be exiled from this country and from all his known family based upon its erroneous legal interpretation that his plea to a violation of N.J. Stat. Ann. § 2C:12-1B(1)—aggravated assault—is an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F).[1] The DOJ's argument is based upon an analysis that was rejected by the Supreme Court and ignores the analysis that the Third Circuit has consistently applied. The DOJ's second contention that Mr. Baptiste's conviction constitutes morally turpitudinous conduct in violation of 8 U.S.C. § 1227(a)(2)(A) is infected by the same flawed analysis.

As discussed in detail at pages 20-27 of Mr. Baptiste's brief, a violation of N.J. Stat. Ann. § 2C:12-1B(1) does not constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F) because the least culpable conduct criminalized under that statute does not rise to the Third Circuit standard requiring "a 'substantial risk' that intentional force will be used" in the commission of the crime. *Aguilar v. Att'y*

[1] Throughout the reply brief, when a citation is made to Mr. Baptiste's or Petitioner's brief, it is in reference to the brief filed on November 30, 2015. Similarly, any citation made to the DOJ's brief is to the brief filed on December 29, 2015.

Gen. of the United States, 663 F.3d 692, 702 n. 19 (3d Cir. 2011). Similarly, as discussed at pages 28-36 of Petitioner's brief, Mr. Baptiste's guilty plea under N.J. Stat. Ann. § 2C:12-1B(1) does not constitute a crime involving moral turpitude because the least culpable conduct criminalized under the statute is not "vile, base or depraved," as required by the Third Circuit. *Hernandez-Cruz v. Att'y Gen. of the United States*, 764 F.3d 281, 284-85 (3d Cir. 2014).

Adopting the analysis urged by the DOJ would also force this Court to confront the constitutionality of 18 U.S.C. § 16(b). Following the analysis of the Supreme Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015) which found that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally void for vagueness, both the Seventh and Ninth Circuits have found that 18 U.S.C. § 16(b) suffers from the same indeterminacy flaws as the ACCA's residual clause. The DOJ's arguments magnify the vagueness concern surrounding 18 U.S.C. § 16(b). This Court, following the other circuits, should also find 18 U.S.C. § 16(b) unconstitutionally vague.

The Immigration and Nationality Act (INA) precludes discretionary relief for individuals who have been convicted of aggravated felonies. Discretionary relief enables an Immigration Judge (IJ) to weigh the equities in favor of and against

allowing a non-citizen to remain in the United States. The IJ is prohibited from considering the equities if a non-citizen has committed an aggravated felony.

The DOJ chose not to pursue this route, instead following the heavy-handed route of deportation without any consideration of the equities, despite the fact that deportation has been consistently recognized as a "drastic measure." *Kawashima v. Holder*, 132 S.Ct. 1166, 1177 (2012) (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The DOJ's inclusion of Mr. Baptiste's prior negative immigration history as a thinly veiled attempt to suggest that this Court should rely on anything other than the categorical approach and an evaluation of case law and statutory elements is inappropriate.[2] Petitioner therefore urges this Court to disregard the irrelevant first ten pages of the DOJ's brief and instead focus on the actual issues here: (1) whether Petitioner's conviction under N.J. Stat. Ann. § 2C:12-1B(1) constitutes an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F); (2) constitutes a crime involving moral turpitude; and (3) whether 8 U.S.C. § 1101(a)(43)(F) is unconstitutionally void for vagueness, as the Ninth and Seventh Circuits have found.

[2] Moreover, the background material discussed by the DOJ ignores the fact that the Immigration Judge noted that Mr. Baptiste was a "personally sympathetic person." Instead the DOJ attempts to distort the equities which could eventually be evaluated. JA0022-0023.

II. MR. BAPTISTE'S CONVICTION UNDER N.J. STAT. ANN. § 2C:12-1B(1) DOES NOT CONSTITUTE AN AGGRAVATED FELONY AS DEFINED IN 8 U.S.C. § 1101(a)(43)(F).

The proper method for determining whether an offense constitutes a crime of violence focuses on whether the least culpable conduct under the controlling statute involves a substantial risk of intentional force. *See Aguilar v. Att'y Gen. of the United States*, 663 F.3d 692 (3d Cir. 2011); Pet. Br. at 22. Indeed, the DOJ actually concedes this point. Resp't. Br. at 35. Remarkably, the DOJ ignores this legal standard and applies Justice Alito's dissenting views in *Johnson* to argue that the analysis should turn on a "common case" scenario. This is despite the fact that the majority opinion in *Johnson* makes clear that trying to construct a hypothetical "common case" was one of the main factors which lead to the ultimate conclusion that the residual clause of the ACCA was void for vagueness. *Johnson v. United States*, 135 S.Ct. 2551, 2559 (2015); Pet. Br. at 39. As a result, the DOJ reaches the incorrect conclusion that a conviction under N.J. Stat. Ann. § 2C:12-1B(1) is a crime of violence.

A. The Proper Method of Determining Whether an Offense Constitutes a Crime of Violence Focuses on the Least Culpable Conduct.

The DOJ correctly identifies the relevant cases which control the categorical approach used to determine what constitutes a crime of violence under 18 U.S.C. §

16(b), but then misapplies *Aguilar* and all but ignores *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The DOJ improperly construes language in *Aguilar* to mean that the proper analysis in determining whether a statute meets the requirements of 18 U.S.C. § 16(b) is to examine the nature of the "common" or "ordinary" case. Resp't. Br. at 32. Significantly, the DOJ disregards the state law involved, N.J. Stat. Ann. § 2C:12-1B(1), and bafflingly comes to the conclusion that the reckless conduct covered by the statute involves a substantial risk of intentional force. In following such a flawed analysis, the DOJ ignores numerous cases which show that the least culpable conduct in N.J. Stat. Ann. § 2C:12-1B(1) is directly analogous to the least culpable conduct in *Leocal* and therefore not a crime of violence. A contrary conclusion, as urged by the DOJ, would lead to an arbitrary, uneven, and untenable application of the INA.

Instead of analyzing the risk of force involved with the least culpable conduct as Supreme Court and Third Circuit law require, the DOJ asks this Court to identify the "common case" which would arise under N.J. Stat. Ann. § 2C:12-1B(1). No case law supports this nascent standard and the DOJ only urges the application of this new test to attempt to differentiate the statute in question from *Leocal*. *See Moncrieffe v. Holder*, 133 S.Ct. 1687, 1684 (2013); *Leocal*, 543 U.S. at 1 (analyzing 18 U.S.C. § 16(b)).

The DOJ points the Court's attention to the fact that *Aguilar* states that a law that would qualify as a crime of violence may include some small number of factual scenarios where the perpetrator avoids using physical force. *Aguilar*, 663 F.3d at 702 n. 19. The *Aguilar* Court, however, was specifically clarifying that non-consensual sexual intercourse would constitute a crime of violence by stating that the "relevant question under § 16(b) is whether there is a 'substantial risk' that [intentional force] will be used." *Id.* The question of whether the least culpable conduct contained within N.J. Stat. Ann. § 2C:12-1B(1) is a crime of violence is therefore simply a question of whether acting recklessly and with extreme indifference to the value of human life constitutes a crime of violence; it is not a question of what the "common case" under the statute would be.

The DOJ attempts to confuse this issue by pointing to the "common case of second-degree aggravated assault," but this approach is contrary to the relevant case law. Resp't. Br. at 32. The correct approach, and the one rooted in *Aguilar*, is whether the least culpable conduct by its nature gives rise to a substantial risk of physical force against another person. *Aguilar*, 663 F.3d at 697. Nowhere in *Aguilar*, *Leocal*, or the litany of other cases is there a discussion of the "common case" of a particular offense. *See Bautista v. Att'y Gen. of the United States*, 744 F.3d 54, 61 (3d Cir. 2014); *Moncrieffe v. Holder*, 133 S.Ct. 1687, 1684 (2013)

(referencing the Court's "focus on the minimum conduct criminalized by the state statute…"); *Aguilar*, 663 F.3d 692; *Joseph v. Att'y Gen. of the United States*, 465 F.3d 123, 128 (3d Cir. 2006) (in determining whether a violation is an aggravated felony "only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant"); *Leocal*, 543 U.S. at 1.

The question the Court must answer is not whether the most common case covered by the statute results in a substantial risk of force but instead is whether the least culpable conduct covered results in such a risk. *Id.* Utilizing this standard demonstrates that the least culpable conduct is analogous to the conduct in *Leocal*, and therefore should lead this Court to the conclusion that N.J. Stat. Ann. § 2C:12-1B(1) does not constitute a crime of violence.

B. The Least Culpable Conduct Under N.J. Stat. Ann. § 2C:12-1B(1)—Driving while Intoxicated and Causing Injury to a Third Party—Does Not Satisfy the Requirements Set Forth in 18 U.S.C. § 16(b) and Is Not an Aggravated Felony.

A second glaring error in the DOJ's analysis is reflected in its contention that "the factual scenario of 'driving while intoxicated and causing injuries' would not suffice to sustain a conviction for second-degree aggravated assault." Resp't. Br. at 29. The DOJ is wrong on this point. There are several New Jersey cases involving convictions of aggravated assault where the underlying conduct was driving while

intoxicated and causing injury to a third party. *State v. Gregg*, 650 A.2d 835 (N.J. Super. Ct. App. Div. 1994); *See also State v. Pigueiras*, 781 A.2d 1086 (N.J. Super. Ct. App. Div. 2001); *State v. Kromphold*, 744 A.2d 640 (N.J. 2000). The Court need not speculate about what would be the "least egregious possible fact pattern necessary for a conviction" under this statute. Resp't. Br. at 28. Individuals have actually been convicted of second-degree aggravated assault for driving while intoxicated and causing injury to a third party. No conjecture or hypothesizing is required. However, instead of applying the correct approach, the DOJ attempts to rewrite New Jersey case law—a power it does not possess.

Perhaps recognizing its error, the DOJ then argues that to meet the higher standard of a second-degree aggravated assault, the "defendant's 'pre-driving conduct, such as drinking, and conduct associated with the driving must be so extraordinary and extreme'" to meet the standard for "circumstances manifesting extreme indifference to human life" as defined in N.J. Stat. Ann. § 2C:12-1B(1). Resp't. Br. at 29. This attempt to differentiate between an actor who was "really drunk" instead of merely "above the legal limit" finds no basis in case law. New Jersey state courts have upheld jury instructions in aggravated assault cases defining recklessness when "one is said to act recklessly if one acts with recklessness, with scorn for the consequences, heedlessly, or foolhardy," and have

found that “circumstances manifesting extreme indifference to the value of human life” can be inferred from “the nature of the acts itself and the severity of the resulting injury.” *State v. Pigueiras*, 781 A.2d 1086, 1094-95 (N.J. Super. Ct. App. Div. 2001). Accordingly, to sustain a conviction under N.J. Stat. Ann. § 2C:12-1B(1), the conduct does not need to be “extraordinary and extreme,” but can instead be foolhardy or heedless as long as injury results.

Further, although the defendant's conduct, such as his or her level of intoxication, plays a role in determining if second-degree aggravated assault is a possible charge, luck can also be factor. State law demonstrates that convictions for second-degree aggravated assault have been sustained where there were four victims, but only two sustained sufficient injuries to warrant a serious bodily injury charge. *Kromphold*, 744 A.2d at 641. Moreover, one of the four victims only suffered from whiplash, which was insufficient to sustain a charge of second-degree aggravated assault. *Id.* The only difference between the passenger who suffered serious injuries and this passenger was where they were sitting—in essence, luck. Therefore, if second-degree aggravated assault is categorically considered a crime of violence, a individual’s conduct could rise to an aggravated felony under 18 U.S.C §16(b) based on luck.

Under the least culpable conduct test, a violation of N.J. Stat. Ann. § 2C:12-1B(1) is not an aggravated felony because the statute includes accidental actions, mistakes, heat of the moment reactions, and other purely reckless conduct that the INA, Supreme Court, and Third Circuit exclude from the definition of violent crimes.[3] *See, e.g.*, *Leocal*, 543 U.S. 1; *Tran v. Gonzales*, 414 F.3d 464, 470-71 (3d Cir. 2005). This analysis takes into account that under 18 U.S.C. §16(b) a crime of violence "requires a substantial risk that physical force will be used against the person." *Tran*, 414 F.3d at 465. Further, the Third Circuit requires the reckless crime to raise a "substantial risk that the perpetrator will *intentionally* use force in furtherance of the offense." *Aguilar v. Att'y Gen. of the United States*, 663 F.3d 693 (emphasis added).

[3] The DOJ's insistence upon using the non-precedential *Briolo* opinion is inappropriate and this Court should disregard its line of argument. In arguing for the use of *Briolo*, the DOJ ignores the fact that the petitioner was *pro se*. Further, in *Briolo*, the court did not consider petitioner's claims because his arguments were "undeveloped and largely just assertions." *Briolo v. Att'y Gen. of the United States*, 515 F. App'x 126, 127 (3d Cir. 2013). The petitioner in *Briolo* made no arguments asserted by Mr. Baptiste in this case and the Third Circuit has therefore not previously considered these arguments. *See id.* at 128. Furthermore, application of the reasoning in *Briolo* would destroy the application of the least culpable conduct standard. If the DOJ's suggested approach in this case is adopted, all crimes committed "under circumstances manifesting extreme indifference to the value of human life recklessly" and causing serious bodily injury would be deemed crimes of violence under 18 U.S.C §16(b).

Driving while intoxicated and causing unintentional serious bodily injury to a third party is the least culpable conduct that can be punished under N.J. Stat. Ann. § 2C:12-1B(1). *State v. Pigueiras*, 781 A.2d 1086; *State v. Gregg*, 650 A.2d 835; *State v. Kromphold*, 744 A.2d 640. This conduct does not necessarily involve intentional use of physical force as required by the Third Circuit, and as a result driving while intoxicated does not meet the standards required by 18 U.S.C. § 16(b) to constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F). Mr. Baptiste's conviction under this statute must be considered using the least culpable conduct, and accordingly this Court should find that it does not constitute an aggravated felony.

III. FOR SIMILAR REASONS, MR. BAPTISTE'S CONVICTION UNDER N.J. STAT. ANN. § 2C:12-1B(1) DOES NOT CONSTITUTE A CRIME INVOLVING MORAL TURPITUDE.

Mr. Baptiste notes, and the DOJ does not dispute, that the standards for determining whether a violation of a statute constitutes morally turpitudinous conduct hinge on whether the statute criminalizes conduct which is "base, vile, or depraved," "contrary to the rules of society," and whether it contains a requisite degree of "scienter-consciousness." *See, e.g., Jean-Louis v. Att'y Gen. of the United States*, 582 F.3d 462 (3d Cir. 2009); *Partyka v. Att'y Gen. of the United States*, 417 F.3d 408 (3d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir.

2004); Resp't. Br. at 48. For the purposes of this Court's inquiry, therefore, the question is whether a violation of N.J. Stat. Ann. § 2C:12-1B(1), using the least culpable conduct approach, constitutes a crime involving moral turpitude.

As discussed in section II(B), *supra*, the DOJ is wrong in its assertion that driving while intoxicated and causing serious bodily injury to a third party is not conduct that can be prosecuted under N.J. Stat. Ann. § 2C:12-1B(1). People have been convicted of second-degree aggravated assault for precisely this conduct. *See*, *e.g.*, *State v. Pigueiras*, 781 A.2d 1086; *State v. Kromphold*, 744 A.2d 640. Moreover, while the DOJ suggests that this Court look simply to the statutory elements and avoid considering conduct which has actually been criminalized, under *Jean-Louis*, 582 F.3d at 471, an evaluation of the least culpable *hypothetical* conduct is the analysis adopted by the Third Circuit.

Here, the Court does not need to engage in an evaluation of hypothetical conduct because as noted in section II(B), *supra*, state law conclusively demonstrates that an individual who has driven while intoxicated and caused injury to a third party can be prosecuted under N.J. Stat. Ann. § 2C:12-1B(1). Importantly, in evaluating what conduct is sufficient to constitute a violation of the statute, New Jersey state courts have sustained convictions for persons who drove while intoxicated and caused injury to third parties based on the level of

intoxication and the severity of injuries to third parties. *See, e.g.*, *Kromphold*, 744 A.2d at 642. New Jersey courts have and have permitted juries to draw inferences that an individual who drives while intoxicated is consciously disregarding the risk of accident. *Id*.

The Third Circuit has noted that "drunk driving…almost certainly does not involve moral turpitude." *Knapik*, 384 F.3d at 90. Because the least culpable conduct under N.J. Stat. Ann. § 2C:12-1B(1) is more properly analogized to *Leocal v. Ashcroft* and driving while intoxicated than to *Knapik v. Ashcroft* and reckless endangerment causing a grave risk of death, Mr. Baptiste's conviction under N.J. Stat. Ann. § 2C:12-1B(1) does not constitute a crime involving moral turpitude.

IV. THIS COURT SHOULD ADOPT THE REASONING OF *JOHNSON* AND JOIN THE NINTH AND SEVENTH CIRCUITS IN FINDING SECTION 16(b) VOID FOR VAGUENESS.

Section 16(b) suffers the same flaws that prompted the Supreme Court to find the residual clause of the ACCA void for vagueness. *See Johnson*, 135 S.Ct. 2551. Indeed, the United States conceded this very point when the Brief of the Solicitor General for the United States in *Johnson* argued that 18 U.S.C. § 16(b) "requires a court to identify the ordinary case of the commission of the offense," which makes it "*equally susceptible to petitioner's central objection to the residual clause*." Brief for the United States of America, *Johnson v. United States*, 2015 WL

1284964, 22-23 (2015) (emphasis added). While we understand the DOJ's desire to win this case, it is disconcerting that the United States Government argued before the Supreme Court that Section 16(b) is "equally susceptible" to the very argument that the Supreme Court relied upon to find the ACCA's residual clause void for vagueness, but now argues the opposite before this Court.

The Supreme Court held the ACCA's residual clause suffered from two features that "conspire[d] to make it unconstitutionally vague:" (1) an "indeterminacy about how to measure the risk posed by a [particular] crime" in the ordinary case; and (2) an "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Johnson*, 135 S.Ct. at 2557-58. Indeed, the DOJ acknowledges that it is these two features which the Supreme Court found conspire to make the residual clause of the ACCA unconstitutionally vague. *See* Resp't. Br. at 38. First, the Court found there is "no reliable way to choose between…competing accounts of what constitutes an *ordinary* case." *Id*. at 2558 (emphasis added). Second, even if the Court could discern the ordinary case for a given statute, the ACCA's residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," or when the ordinary case of a particular statute constitutes a "serious potential risk of physical injury." *Id*.

Section 16(b) contains the same flaws, as it also is subject to the categorical approach, resulting in a risk-based standard applied to "an idealized ordinary case of the crime." *Johnson*, 135 S.Ct. at 2561. The DOJ's brief never disputes that Section 16(b) contains both of these features, which, according to the *Johnson* court, conspire to violate due process. Rather, the DOJ tries to find a distinction that had no bearing on the Supreme Court's holding (the four examples of enumerated offenses), and invokes an unpersuasive "the sky is falling" argument, both discussed below.

Following *Johnson*, the Ninth Circuit in *Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015) (rehearing *en banc* denied January 25, 2016, Dkt. No. 114) held that the definition of crime of violence in Section 16(b) is "subject to identical unpredictability and arbitrariness as the ACCA's residual clause."[4] The court explained that *Johnson*'s "reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA." *Id*. As Section 16(b) applies a risk-based standard to imagined conduct, it poses a vagueness problem. Both statutes combine

[4] Mr. Baptiste notes also that following the decision in *Dimaya*, a panel of three separate judges relied on *Dimaya* to reach the same conclusion in a different case. This decision was non-precedential and relied on *Dimaya* as binding precedent to reach its conclusion. *Magana-Pena v. Lynch*, 2016 WL 144100 (9th Cir. 2016).

"indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify" as a crime of violence. *Id.* at 1117. As a result, the court found Section 16(b) unconstitutionally vague as well.

Most recently, the Seventh Circuit similarly found Section 16(b) unconstitutionally vague. The court reasoned that Section 16(b) relied on a mode of analysis materially the same as the ACCA's residual clause. *United States v. Vivas-Ceja*, 808 F.3d 719, 722 (7th Cir. 2015). The court further noted that, although Section 16(b) substitutes "by its nature" for the residual clause's "otherwise involves conduct," the two phrases have been found to be synonymous because both Section 16(b) and ACCA's residual clause require an "evaluation of 'the elements and the nature of the offense of conviction.'" *Id*. Likewise, the substitution of "substantial risk" in Section 16(b) for "serious potential risk" in the ACCA's residual clause is inconsequential as neither clause offers any "guidance to determine when the risk involved in the ordinary case qualifies." *Id*.[5]

[5] As discussed at pages 4 to 7 of this brief, the Third Circuit has consistently applied the least culpable conduct approach in dealing with what constitutes a crime of violence under the INA. Because the Ninth and Seventh Circuits used *Johnson*'s "ordinary case" language in evaluating the constitutionality of 18 U.S.C. 16(b), Petitioner uses that terminology here. Further, the fact that the DOJ is unable to analyze whether Petitioner's conviction is an aggravated felony without

In the face of *Johnson*, the holdings of the Ninth and Seventh Circuits, and the DOJ's concession in the *Johnson* briefing that Section 16(b) is susceptible to the same vagueness concerns that plagued the residual clause of the ACCA, the DOJ has little it can credibly argue. The DOJ thus resorts to invoking a "the sky is falling" argument by contending that many statutes employ a type of categorical approach based on a common case comparison. *See* Resp't. Br. at 38 (referencing Supp. Brief for Respondent at 22, App. A, Johnson, 2015 WL 1284964, at *22, *1A where the DOJ lists statutes that it contends would likewise be unconstitutional). However, the Supreme Court already answered this concern stating, "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Johnson*, 135 S.Ct. at 2561. The statutes listed by the DOJ apply a 'substantial risk' or qualitative standard to *real-world* conduct, rather than to *ordinary* conduct, and would not present the vagueness concerns present when applying this risk analysis to hypothetical conduct.

Second, the DOJ argues that the residual clause of the ACCA differs from Section 16(b) because it was preceded by four examples of conduct that would fit

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asking this Court to apply a "common case" approach is evidence of the inherent vagueness in applying the statute. R. Br. at 32, 34, 35. The same vagueness concerns arise even in an application of the least culpable conduct approach.

within the residual clause of the ACCA. Mr. Baptiste addressed this at pages 41 to 44 of his opening brief. The DOJ relies on Judge Callahan's dissent in *Dimaya*, which stated that "the [Supreme] Court faulted the residual clause for requiring potential risk to be determined in light of 'four enumerated crimes-burglary, arson, extortion, and crimes involving the use of explosives . . . [which] are far from clear in respect to the degree of risk each poses.'" Resp't Br. At 42-43; *Dimaya*, 803 F.3d at 1125 (quoting *Begay v. United States*, 553 U.S. 137, 142-43 (2008)). However, as the Seventh Circuit explained, "the enumeration of specific crimes did nothing to clarify the quality or quantity of risk necessary to classify offenses under the statute" and "wasn't one of the 'two features' that combined to make the clause unconstitutionally vague." *Vivas-Ceja*, 808 F.3d at 723. The two features alone combine to result in a vague, unconstitutional inquiry.

Ultimately, both statutes are subject to the same constitutional defect and accordingly *Johnson* dictates that Section 16(b) should be held void for vagueness. *Id*. at 2558. As the First Circuit recently noted, a "flood of appellate ink [has been] poured in attempts to classify various state laws under [the crime of violence definition]." *Whyte v. Lynch*, 807 F.3d 463, 466 (1st Cir. 2015) (citing *United States v. Fish*, 758 F.3d 1, 4 (1st Cir. 2014)). While this Court can avoid striking 18 U.S.C. § 16(b) as void for vagueness by finding that the crimes involved were

not crimes of violence or crimes involving moral turpitude, this Court will undoubtedly continue to pour ink in an attempt to provide some meaningful guidance for this vague standard. However, those affected by the application of Section 16(b) will continue to confront the same vagueness concerns that lead the Supreme Court to strike down the ACCA's residual clause. This Court should therefore find that Section 16(b) is void for vagueness.

V. CONCLUSION

Petitioner asks that this Court reject the incorrect legal theories advanced by the DOJ and instead continue to apply the least culpable conduct approach to the analysis of this case. Under this approach, Petitioner's guilty plea under N.J. Stat. Ann. § 2C:12-1B(1) does not constitute an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F) or a CIMT. Alternatively, this Court should find 18 U.S.C. § 16(b) unconstitutionally void for vagueness. Further, given the fact that Petitioner has long past served his criminal sentence and has now been detained an additional two years, seven months, and seventeen days as of the filing of this brief, this Court should order his immediate release.

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Dated: January 28, 2016

CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE 32(a)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains less than 7,000 (4,542) words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman Font.

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CERTIFICATION OF SERVICE

I certify that the original and nine copies of this brief are being sent to the Clerk of the Court today, January 28, 2016, by United Parcel Service (UPS) Next Day Delivery. I further certify that one copy of the brief is being served today, January 28, 2016, on the respondent, the United States Department of Justice, by United Parcel Service (UPS) Next Day Delivery.

I certify under penalty of perjury that the foregoing statements by me are true.

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